(26)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 449

HERMAN J. RUBENSTEIN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FRANCIS J. QUILLINAN,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Herman J. Rubenstein, respectfully submits his petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled case on August 25, 1945 (R. 225), affirming the judgment of conviction of the District Court of the United States for the Southern District of New York (R. 189).

Opinion of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals for the Second Circuit (Circuit Judges L. Hand, Augustus N. Hand and Frank; Judge L. Hand writing) was filed August 25, 1945, and appears at page 210 of the record. It is reported in F. (2d) ——. There is a dissenting opinion by Judge Frank (R. 215).

Jurisdiction

1. The jurisdiction of this Court is invoked under Judicial Code, Section 240 as amended by the Act of February 13, 1925; 43 Stat. 938; U. S. C. Title 28, Section 347.

2. The original date of the judgment to be reversed is August 25, 1945 (R. 225).

Questions Presented

1. Whether the Act of February 26, 1919, Ch. 48, 40 Stat. 1181, 28 U. S. C. A. #391 (Judicial Code #269 as amended) requires an appellant to establish prejudice in addition to substantial error.

2. Whether the rule applied in the Circuit Court of Appeals for the Second Circuit, that a conviction will be affirmed on appeal if from the record before it the Appellate Court believes a defendant proven guilty regardless of any erroneous and prejudicial evidence therein, impairs the right to a jury trial under the Constitution, Article 3, Section 2, Clause 3 and Amendment VI.

3. Whether the above mentioned rule of the Second Circuit is contrary to the rule of this Court.

4. Whether the above mentioned rule of the Second Circuit is in conflict with the rule followed in the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits.

Statutes Involved[1]

Act of February 26, 1919, Ch. 48, 40 Stat. 1181, 28 U. S. C. A. #391 (Judicial Code #269 as amended) in part provides:

"* * * On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Constitution of the United States, Article 3, Section 2, Clause 3:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; * * *."

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[1] The statutes on which the indictment is founded are the following:

R. S. #5440; May 17, 1879, C. 8, 21 Stat. 4; March 4, 1909, C. 321, #37, 35 Stat. 1096 (Title 18 U. S. C. Sec. 88) provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more or such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Act of March 4, 1929, C. 690, #2, 45 Stat. 1551 (Title 8 U. S. C. Sec. 180a) provides in part:

"Any alien who after March 4, 1929, * * * obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000 or by both such fine and imprisonment."

Paragraph (c) of Act of May 26, 1924, c. 190, #22, 43 Stat. 165; Reorg. Plan No. V, eff. June 14, 1940, 5 Fed. Reg. 2423, 54 Stat. 1238 (Title 8 U. S. C. Sec. 220) provides:

"Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, * * *."

Statement of the Case

The petitioner was tried alone for conspiring to obtain the entry into the United States of one Alice Spitz, a Czechoslovakian, by means of a false and misleading petition and application filed with the Immigration and Naturalization Service (R. 4-8). Sandler, Muller and said Alice Spitz were named as co-defendants. They pleaded guilty prior to the trial but were not sentenced until after it (R. 41, 99, 111). They were the principal witnesses for the prosecution.

The chief alleged fraud, upon which the case turned, was the failure to disclose that Spitz' marriage to Sandler consisted of a bare legal ceremony which was entered for the purpose of procuring Spitz' entry and with the mutual understanding that, after she had entered the United States as the wife of an American citizen, the marriage would be dissolved.

Muller was a family connection of Spitz. It was to him she applied to find her an American husband when, while here on a temporary visa, Hitler invaded Czechoslovakia, so that she became afraid to return (R. 42, 63, 105). Thereafter Muller introduced Sandler to Spitz who offered him $200 upon his agreeing to her proposal (R. 24, 25, 68, 69, 106). They were married on July 29, 1939, by a Judge in Newark, N. J. (R. 25, 69).

It was not until the following spring that petitioner allegedly entered the conspiracy. Spitz was introduced to him by chance and, learning that he was a lawyer, asked

him to prepare the necessary papers for her entry (R. 27, 28). There was evidence that petitioner was informed of the intention to procure a divorce after the entry would have been effected (R. 36, 71).

As the result of the documents which were prepared and submitted to the authorities by petitioner, Spitz was granted a permanent visa at Montreal under which she re-entered the United States on December 20, 1940 (R. 21, 38).

As part of its prima facie case the Government also offered evidence to show that in Janaury, 1941, Spitz came to petitioner's office and asked him to get her a divorce (R. 39, 149). An action was commenced in the New York Supreme Court on January 25th, as a result of which a divorce was granted (R. 41, 151, 154). Evidence was admitted showing that petitioner procured one Haimowitz to execute a false affidavit of service upon Sandler of the summons and complaint in the divorce action (R. 116, 117), a false affidavit of non-military service regarding Sandler, who was then in the army (R. 77, 120, 121), and to swear falsely before the official referee that he had discovered Sandler in a room with a partially dressed woman (R. 118, 119).

At the trial petitioner's counsel repeatedly objected to the introduction of testimony concerning the divorce upon the ground that the conspiracy attained its object and terminated with Spitz' entry on December 20, 1940 (R. 38-41, 74-75, 78-79, 112-121). Also at the close of the prosecution's case and at the close of the entire case petitioner moved to strike out all such testimony (R. 129, 177). These motions were denied without any other statement by the trial court of the grounds for admitting the evidence.

Petitioner also requested the trial court to take judicial notice under the testimony and under the law and statutes of New Jersey and New York that the marriage of Spitz

and Sandler was neither void nor voidable, which request was denied. Petitioner also moved to strike out the testimony concerning the divorce in this connection, i. e. that it was not the marriage but the collusive divorce which was void or voidable, which motion likewise was denied (R. 79, 80).

On appeal to the Circuit Court of Appeals the above mentioned rulings of the District Court were assigned as error (R. 203, 204).

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred:

1. In affirming the judgment of the trial court.

2. In holding the fact of a divorce, occurring after the termination of the conspiracy, was admissible in evidence (R. 212).

3. In holding that the concealment from the immigration authorities of a subjective intent to obtain a divorce constitutes fraud in a criminal case (R. 214-215).

4. In holding that ti was no error (R. 213) or harmless error (R. 214) to admit evidence of petitioner's subornation of perjury in connection with two affidavits and testimony in the divorce proceeding, and of his attempt to procure a collusive divorce by asking Sandler to get a girl to go to a hotel room (R. 213).

5. In holding that Spitz and Sandler were not married (R. 214).

Reasons for Granting the Petition

A review of the decision of the court below is sought:

1. Because the question of whether or not the Act of February 26, 1919, Ch. 48, 40 Stat. 1181, 28 U. S. C. A. #391 (Judicial Code #269 as amended), requires an ap-

pellant to establish prejudice in addition to substantial error, is an important question in the administration of federal criminal justice.

2. Because the effect of the decision of the court below is that, if from the record the appellate court believes a defendant proven guilty, it will disregard any erroneous and prejudicial evidence and the effect this might have had upon the jury, thereby impairing the defendant's right to a jury trial under the Constitution, Article 3, Section 2, Clause 3 and Amendment VI.

3. Because the harmless error rule followed by the Second Circuit and applied in this case is contrary to the rule of this court. *Weiler* v. *United States,* 323 U. S. 608, 611; 65 S. Ct. 548; 89 L. Ed. 443 (1945); *Bruno* v. *United States,* 308 U. S. 287, 294; 60 S. Ct. 198; 84 L. Ed. 257 (1939); *McCandless* v. *United States,* 298 U. S. 342, 347, 348; 56 S. Ct. 764; 80 L. Ed. 1205 (1936).

4. Because the harmless error rule followed by the Second Circuit and applied in this case is in conflict with the rule of the six other Circuits which have passed upon the question. *Farris et al.* v. *Interstate Circuit, Inc.,* 116 F. (2nd) 409, 412 (C. C. A. 5th—1941); *Evansville Container Corporation* v. *McDonald,* 132 F. (2nd) 80, 85 (C. C. A. 6th—1942); *Worcester et al.* v. *Pure Torpedo Co.,* 127 F. (2nd) 945, 947, 948 (C. C. A. 7th—1942); *Fort Dodge Hotel Co.* v. *Bartelt,* 119 F. (2nd) 253, 259 (C. C. A. 8th—1941); *Lynch* v. *Oregon Lumber Co. et al.,* 108 F. (2nd) 283, 285, 286 (C. C. A. 9th—1939); *Little* v. *United States,* 73 F. (2nd) 861, 866, 867; 96 A. L. R. 889 (C. C. A. 10th—1934).

Judge Learned Hand's opinion states there was no error (R. 214) in admitting detailed evidence of suborned perjury as merely cumulative evidence to prove a collusive divorce to prove a previously existing intent to divorce, which, it is held, was a part of the crime. If the statement expressed

the actual substance of the decision, petitioner would not vainly ask this court to review a holding in the law of evidence. Actually it is tacitly but clearly signified in the subsequent wording of the opinion that the admission of this evidence is deemed error but as such is held harmless error within the rule applied in the Second Circuit. Immediately following the statement of no error, the Opinion supplies various finely spun reasons which culminate in the propriety of the prosecution buttressing its facts as much as possible (R. 213). Nevertheless, the opinion then continues in these words (R. 213): "Besides, even if the affidavits and the testimony had not been competent, Rubenstein was not injured." It is significant that the opinion likewise states, "The crime was proved beyond the faintest peradventure of doubt" (R. 215). It is clear that the Court below was thus applying its interpretation of the harmless error rule, namely that if the appellate court decides from the record that the defendant was guilty, it will disregard the effect any error may have had on the jury.[2]

The detailed evidence of the distinct and serious crime of suborning perjury was, at the most, but weakly probative of the facts in issue while at the same time it was very likely to prejudice the jury against the defendant. As such it was plainly inadmissible. *United States* v. *Krulewitch*, 145 F. (2nd) 76, 80 (C. C. A. 2nd—1944); Wigmore on Evidence, Section 1904.

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[2] The Circuit Court of Appeals for the Second Circuit in *United States* v. *Liss*, 137 F. (2nd) 995, 999 (1943) explicitly stated its rule as follows:

"No question arises more often in criminal appeals than whether an error should result in reversal; formerly—acknowledging that it is theoretically impossibe to fathom the jurors' mind—it was the practice to give the accused the benefit of every intendment; and indeed the modern disposition to assume that an error has been harmless cannot rest upon any unsparing logical analysis. Perhaps all that a court should ever say is that a remote chance of prejudice shoud not balance the extreme probability that the jury came to the right result. A majority of us think that this was the case here."

This petition for certiorari stands on the proposition that the interpretation of the harmless error rule entertained in the Second Circuit is not correct. It is respectfully submitted that the guidance of the Supreme Court on this subject ought not to be evaded because of dextrous words in an opinion that end to veil its actual, undistorted purport.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated: September 24, 1945.

HERMAN J. RUBENSTEIN,
By FRANCIS J. QUILLINAN,
Counsel for Petitioner.